148 US 664

RECORD, CASE No. 13,772.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 182.

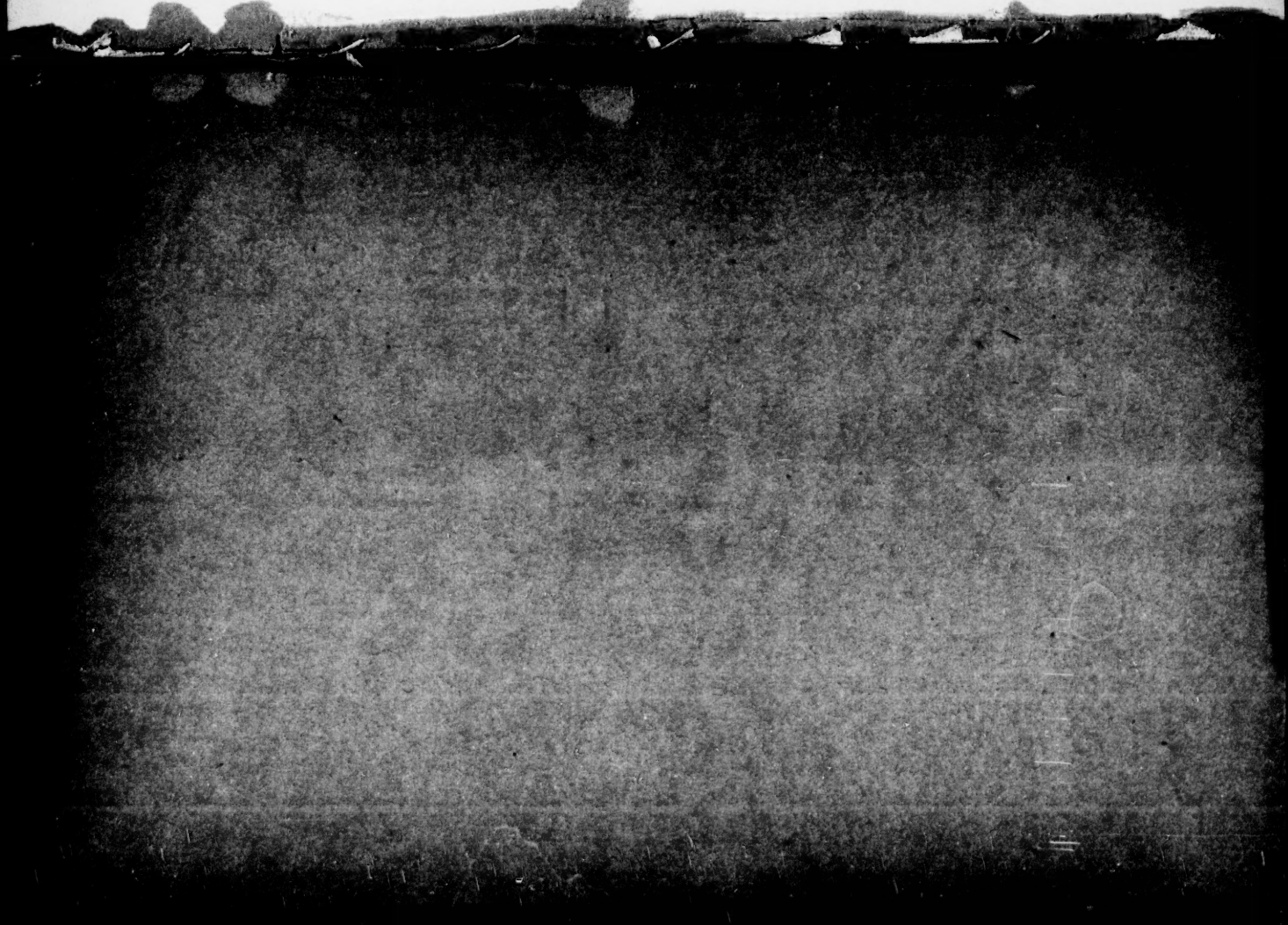
SARAH R. MEXIA AND E. A. MEXIA, HER HUSBAND, PLAINTIFFS IN ERROR,

vs.

T. J. OLIVER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 15, 1889.



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 21, 1893.

1 *Plaintiffs' First Amended Original Petition.*

UNITED STATES OF AMERICA,
Northern District of Texas.

In the Circuit Court of the United States for the Northern District of Texas, at Waco. Law Side.

To the honorable judges of said court:

The petition of Sarah R. Mexia, joined herein by her husband, Enrigue A. Mexia, citizens of the Republic of Mexico, residing in the city of Mexico, in said republic, complaining of T. J. Oliver, a resident citizen of said State of Texas and in Limestone county, in said State of Texas, and in said northern district, respectfully shows that heretofore, to wit, on the first day of January, A. D. 1878, they were lawfully seized and possessed in fee in right of said Sarah R. Mexia of the following-described tract of land situated in said northern district of Texas, in the said county of Limestone, and designated and described by the following metes and bounds, being some four thousand (4,000) acres, more or less, out of the eleven leagues of land granted originally to Pedro Varella:

Beginning at a stake and mound on the eastern boundary of the Pedro Varella eleven-league grant 2,253 veras south 45 east from the northeast corner of said eleven-league grant, said stake and mound being also the southeast corner of a 6,000-acre tract in the name of Jose M. Cabellero out of said eleven-league grant, as the same was originally surveyed and established in June, 1855, by G. H. Cunningham, surveyor, at the instance of E. A. Mexia, agent for J. M. Cabellero and plaintiffs' vendors, thence south 45

2 west with the south boundary line of said 6,000-acre tract, at 1,853.9 v's pass corner of sections one and two (1 & 2) (according to a block of surveys made by G. H. Cunningham in 1856 in sectionizing and subdividing said eleven-league grant, and set apart to plaintiff Sarah R. Mexia by deed of partition between Adelaid M. Hammekin, Geo. L. Hammekin, Sarah R. Mexia, and E. A. Mexia, dated March 30th, 1874); continuing with said boundary line south 45 west, at 3,707.8 varas pass corners — sections No-. 2 & 3 of said block of surveys; thence continuing with said line south 45 west, at 5,561.7 varas pass corners of sections 3 & 4 at a stake from which a mesquite 6 in. in dia. bears south 16½ west 115 varas; continuing the same course with said boundary line, at 7,415.4 varas pass corners of sections 4 and 5 (of said block) at a stake from which a mesquite 3 in. in dia. b'rs S. 72 E. 102 varas; continuing said course with said boundary line, at 9,269.1 varas pass corners of sections 5 and 6 (of said block) at a stake from which a post oak 15 in. in dia. b'rs north 33 west 7 varas, and another, 16 in. dia., b'rs N. 42 W. 7½ varas; continuing said course with said boundary line south 45 west, at 10,069.1 varas come to corner of R. D. Peoples' survey, at stake in prairie for northwest corner of this.

Thence south 40 east with said Peoples' boundary line 650 varas

to a corner of same; thence north 50 east with said Peoples' boundary line 300 varas to another corner of same; thence south 55 east 275 varas to another corner of said Peoples' survey to a stake from which a locust 4 in. dia. b'rs 2½ W. 15½ varas, and two other locusts, 3 and 4 inches in dia., b'rs S. 5′ E. 16½ varas.

Thence south 50′ west with Peoples' line 837 varas to a stake for corner, from which an elm 16½ inches dia. b'rs N. 11½ E. 13 varas, and a gum *elastic* 10 in. dia. b'rs N. 75½′ E. 11 varas.

Thence down the east bank of a branch with its meanders 952 v's to a corner of said Peoples' survey, at a stake from which a
3 hackberry 6 in. in dia. b'rs south 50′ W. 2 & ½ varas, and an ash 18 in. dia. b'rs S. 50′ W. 3 & ½ varas.

Thence south 45 east with the east boundary of sections No. 7 (of said block of surveys) to the southwest corner of section No. 6; also the southeast corner of section No. 7; also the corners of sections Nos. 18 and 19 (of said block of surveys).

Thence north 45 east with the south boundary lines of said sections No. 6, 5, 4, 3, 2, and 1 eleven thousand one hundred and twenty-two $\frac{8}{10}$ (11,122 & $\frac{8}{10}$) varas to a stake and mound on the eastern boundary of the Pedro Varello eleven-league grant, from which a hackberry 10 in. dia. b'rs S. 36½′ W. 85 varas and a mesquite 8 in. dia. b'rs N. 43′ west 115 varas, which is also the northeast corner of section No. 24 (of said block of surveys), sold to the Houston & Texas Central Railroad Company, as shown from the records of said county of Limestone.

Thence north 45 west 1,949 varas with the east boundary line of said Varello 11-league grant to place of beginning, said boundaries including sections Nos. 1, 2, 3, 4, 5, and a part of section No. 6 of the subdivision and partition of the said Pedro Varella eleven-league grant, as shown on the records of the said Limestone county.

Plaintiffs would show to your honor that on the 11th day of February, 1850, Adelaide M. Hammekin, joined by her husband, Geo. L. Hammekin, being at that time the owners of said eleven-league grant, made, executed, and delivered to one Jose M. Cobellero a conveyance for 6,000 acres of said eleven-league grant, out of the northeast corner of same, before any actual survey was made of said 6,000-acre tract, and that the same was never actually surveyed on the ground until the month of June, 1855, at which time said 6,000-acre tract was actually surveyed on the ground and cut off
4 from said 11-league grant, and the south or southwest boundary line thereof was well established on the ground in accordance with the field-notes as hereinbefore set forth, and the same has ever since been held and regarded and acquiesced in as the south boundary of said 6,000-acre tract and as the division line between the same and the remainder of said 11-league grant on the south and west thereof, and from that time to the present said line & survey has been acquiesced in by the adjacent owners of the land north and south of said line.

That said survey was made and said lines thus established by G. H. Cunningham, then surveyor of the land district in which said land was situated, and was done by request and authority of said

J. M. Cobellero and the said Hammekins, and said survey and lines were afterwards ratified by said Cobellero and the said Hammekins, and ever since acquiesced in by them and their vendees. Now plaintiff would show that such title as defendant claims under is derived from said Cobellero under said conveyance for 6,000 acres, and that defendant will claim and insist in this cause that the south boundary line of said 6,000 acres tract in name of said Cobellero should be at a point about 277 varas further south than as heretofore established and as claimed by plaintiff herein.

Your petitioners further represent that, being so seized and possessed of said tract of land, on the first day of January, 1878, the said T. J. Oliver illegally and with force of arms entered upon said land and ousted and ejected your petitioners from the same, trod down the grass, dug up the dirt, cut down and carried away the timber therefrom, and enjoyed the rents and profits, use and occupation, of the same from said last-named date hitherto with a strong hand down to the present date and day of trial and now still continues so to withhold the possession of said land from your
5 petitioners, who are now the owners of it, to the damage of your petitioners in the sum of ten thousand dollars, and your petitioners say that said land is of the value of twenty thousand dollars.

Premises considered, your petitioners pray for citation to said T. J. Oliver in terms of the law and on trial for a judgment for their said land, damages and costs, and for writ of possession, and for such other relief as they may be entitled to; and they will ever pray, &c.

THOS. HARRISON,
JOHN HANCOCK AND
ANDREWS & LESSING,
Att'ys for Plaintiffs.

(Endorsed:) No. 343. Sarah R. Mexia *et al. vs.* T. J. Oliver. Plaintiffs' first amended original petition. The defendant will take notice that this action is brought as well to try title as for damages. John Hancock and Andrews & Lessing, att'ys for plaintiffs. Filed Nov'r 30, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

6 *Defendant's First Amended Original Answer.*

In the Circuit C't of the United States for the Northern District of Texas.

SARAH R. MEXIA & Her Husband, E. A. MEXIA,
vs.
T. J. OLIVER. } No. 343.

Now comes defendant and, by leave of the court, amends his original answer filed herein on June 6, 1878, to read as follows, to wit:

Comes the defendant and demurrs to plaintiffs' 1st amended orig-

inal petition and says it is insufficient in law, and of this he prays the judgment of the court.

A. C. PRENDERGAST & S. L. SAMUELS,
Def't's Att'ys.

And defendant denies all and singular the allegations in said petition contained.

And defendant says he is not guilty of the wrongs and injuries as charged in said petition, and of this he puts himself upon the country.

And, further answering, defendant says he has been in quiet, peaceable, continuous, and adverse possession for more than three years before the filing of plaintiffs' suit herein of so much of the lands described in said petition as may be and is included within the boundaries following, to wit, in Limestone county, about 6 miles above the town of Springfield, on the northern or left of the River Navasota, being a part of the eleven-league grant by the State of Coahuila and Texas to Pedro Varilla and commencing on the left bank of the eastern (or northern) branch of the Navisoto at the point where the original line of said 11-league grant from the second to the third corners crossed the said creek; thence N. 45 E., following the original line of said 11-league grant, to the original 3rd corner; thence S. 45 E. two thousand-five hundred and thirty
7 (2,530) varas, following the original line of the said 11-league grant; thence S. 45 W., being a line parallel with the first line of this survey, to the left bank of the Navasota; thence up said river to the beginning.

And this defendant, as to all not included in said boundaries, disclaims and says he did not set up any claim thereto at or before the institution of this suit, nor does he at this time, nor has he committed any trespasses thereon.

And as to the land hereinabove described this defendant says he has been in adverse possession of the same, under title, a color of title thereto from and under the sovereignty of the soil, for more than three years before the institution of this suit, and he therefore pleads limitation of three years against plaintiffs as to the said land above described.

And defendant, further answering, says that he and those under whom he claims have had five years peac-able, continuous, adverse possession of the said land described in the plea next preceding this, cultivating and enjoying the same and paying tax thereon and claiming the same under a deed or deeds duly registered, and this he is ready to verify.

And the defendant suggests to the court that he and those persons whose estate he has in the lands and tenements sued for have had adverse possession of the said land described above in his plea of three years' limitation, for one year next before the commencement of this suit, claiming the same in good faith, and that he and those persons whose estate he has have made permanent and valuable improvements on the lands sued for during the time they have had possession of the same, consisting of dwelling-houses, tenant-houses,

barns, stables, outhouses, fences, breaking up and putting into cultivation fields, making fields and gardens, planting orchards,
8 digging wells, &c., &c., of the value of five thousand dollars, which improvements he asks may be valued and allowed him under the statute, etc.

A. C. PRENDERGAST & S. L. SAMUELS,
Def't's Att'ys.

And as to all land not described and included in said boundaries given in above third plea, this defendant disclaims and says he does not now nor has he ever claimed the same nor has he trespassed thereon.

A. C. PRENDERGAST & S. L. SAMUELS,
Def't's Att'ys.

And defendant further avers that on the 27 day of July, 1874, he purchased from Mrs. Maria Dolores, Felicite Conti, the only daughter and only heir of Jose M. Cabellero, the land described in plea No. 3, above set out, paying therefor to said Mrs. Conti the sum of five thousand dollars cash, in gold, and received a deed with said field-notes from said Mrs. Conti & her husband, J. M. Conti, and defendant avers that if the Hammekins & said Cobellero ever agreed that the said 6,000 — tract should be surveyed and the same was so surveyed so as to make its southern boundary 277 varas further north than the southern boundary as called for by said — from Hammekins to Jose M. Cobellero, and afterwards acquiesced in and ratified the same, which is not admitted but expressly denied, then defendant avers that at and before the time he paid said purchase-money and at and before the time he received said deed from Mr. & Mrs. Conti he did not know nor have reason to know and had no notice, actual or constructive, of any kind whatsoever of such agreement, survey, or ratification of said survey, nor that said Hammekins or plaintiffs claimed any right to or interest in said 6,000-acre tract or any part thereof, as set out by *meets* and bounds in said deed to Jose M. Cobellero, and defendant avers that he was a *bona fide* purchaser for value of said land as so described, and believed, in good faith, that he was acquiring the full and complete title to the land
9 as described in said deed to Caballero, and he relied and in good faith beleived he had a right to rely on the description of said land as set out in said deed as correct.

Defendant avers that on —, 187–, he learned that Whitfield Scott claimed to have title to said land derived from the said Hammekins, and he purchased said title from said Scott, paying valuable consideration therefor, and without notice, actual or constructive, at the time he paid said consideration or received his deed from said Scott to said land that any one else had or claimed title to any part of said land, and without notice, actual or constructive, of the agreement, survey, or ratification set out in the preceding plea, and he received from said Scott a deed to said land with the same field-notes as set out in the deed aforesaid to Cobellero; and defendant avers that in purchasing from said Scott he was as to the claims

set up by plaintiffs to said land a *bona fide* purchaser for a valuable consideration.

A. C. PRENDERGAST & S. L. SAMUELS,
Att'y for Defendant.

(Endorsed:) No. 343. Sarah R. Mexia *et al. vs.* T. J. Oliver. Def't's 1st amended original answer. Filed Ap'l 17, 1889. J. H. Finks, clerk.

10 *Plaintiffs' First Supplemental Petition.*

SARAH R. MEXIA *et al.*
vs.
T. J. OLIVER.

Suit pending in U. S. circuit court, Waco, Texas, November term, 1888.

In this cause comes the plaintiffs and file this their first supplemental petition and, demurring to defendant's 1st amended original answer herein filed on 17th day of April, 1889, say that the same is insufficient in law, and of this they pray judgment of the court.

Further pleading herein if they be so required, plaintiffs deny all and singular the allegations, charges, and averments in defendant's said answer contained, and, demanding strict proof of the same, they put themselves upon the country.

And plaintiffs say in replication to defendant's averments and claims of title, under the statutes of limitation of three and five years, to the land herein sued for (said averments & claims in said answer contained) that if defendant had possession under title or color of title of any of the land in plaintiffs' first amended original petition described for the space of three or five years before the institution of this suit in the manner and under the circumstances as alleged by defendant, all of which plaintiff- den*ies*, then that said possession under either or both of said pleas should not and does not constitute a bar to plaintiffs' cause of action herein, for this, to wit, that before, at the time, and ever since the defendant acquired either title, color of title, or possession of said land in plaintiffs' first amended original petition and defendant's answer described
11 plaintiff Sarah R. Mexia was and *and* has continuously been a married woman, the lawful wife of coplaintiff herein, E. A. Mexia; that she had been such married woman for, to wit, ten years before the institution of this suit and for several years prior to the acquiring by defendant of any title, color of title, or possession of any of the land in plaintiffs' first amended original petition described, and plaintiffs aver and say that said Sarah is still the lawful wife of and living with the said E. A. Mexia, all of which plaintiffs are ready to verify. Wherefore plaintiffs pray that they have judgment, as prayed for in their first amended original petition herein filed.

JOHN HANCOCK &
ANDREWS & LESSING,
Att'ys for Pl'ff.

(Endorsed:) No. 343. Sarah R. Mexia *et al. vs.* T. J. Oliver. Pl't'fs' 1st supplemental petition. Filed Nov'r 30, 1888. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

12 *Judgment.*

From the Minutes of the United States Circuit Court at Waco.

SARAH R. MEXIA *et al.*
vs.
T. J. OLIVER. } No. 343.

APRIL 23, 1889.

On April 22nd, 1889, this cause came on for trial and both parties announced ready for trial; thereupon came a jury of good and lawful men, to wit, S. H. Smith, Baker Sadler, L. L. Baker, Wm. N. Rutherford, T. W. Wilie, B. P. Sadler, J. R. Cogdill, A. C. M'Kay, C. H. Terry, W. L. Wells, J. W. Nicholson, and Geo. Jackson, who were duly and legally elected, tried, empannelled, and sworn, but during the trial J. R. Cogdill, one of the jurors, became sick and was by the court excused with the consent of both parties, and thereupon in open court both parties agreed to try the cause before the remaining eleven jurors, and the jury, having heard the pleadings, evidence, argument of counsel, and charge of the court, retired to consider of their verdict, and thereafter, on April 23, 1889, returned into open court the following verdict, to wit, "We, the jury, find for the defendant." A. C. M'Kay, W. N. Rutherford, J. W. Nicholson, B. P. Sadler, George E. Jackson, L. L. Baker, S. H. Smith, T. W. Wilie, W. L. Wells, Baker Sadler, C. H. Terry. It is therefore considered, ordered, and adjudged by the court that the plaintiffs, Sarah R. Mexia and E. A. Mexia, take nothing by this their said suit, and that the defendant, Thomas J. Oliver, go hence without day and have and recover of and from said plaintiffs all costs by him in this behalf incurred, for which let execution issue; and it appearing to the court that the costs and expenses of this suit have been incurred by said Mrs. Sarah R. Mexia for the benefit of her separate property, and that they are reasonable and
13 proper, it is therefore further ordered by the court that execution may be levied upon either the common property of said Sarah R. Mexia and E. A. Mexia or the separate property of said Sarah R. Mexia. It is further ordered that execution shall issue in the names of the parties to this suit for the benefit of the officers of court and all parties entitled to such costs against each party hereto for the costs by them respectively incurred.

14 *Plaintiffs' Bill of Exceptions.*

First.

In Circuit Court, Northern District of Texas, at Waco.

SARAH R. MEXIA *et al.*
vs.
T. J. OLIVER.

Be it remembered that on 22nd day of April, 1889, on the trial of this cause, the defendant offered to introduce in evidence a power of attorney made and executed by Adeliade M. Hammekin to her husband, George L. Hammekin, empowering the said George L. Hammekin to dispose of, in her name, certain real property belonging to her separately, said power of attorney bearing date.

Defendant also offered to introduce in evidence a deed to the certain lands here in controversy made by the said George L. Hammekin, as attorney for his wife and personally for himself, in which deed he acted for his wife under said power of attorney and conveyed the 6,000-acre Cabellero tract of land, by metes and bounds as claimed by defendants, to Whitfield Scott on 18th day of March, 1875. Defendants further offered in evidence a deed from Whitfield Scott to defendant, T. J. Oliver, dated March 20th, 1875, conveying the same land conveyed to Scott by Geo. L. Hammekin for himself and wife as aforesaid.

To the introduction of which testimony the plaintiff objected because:

First. Said power of attorney did not vest in the husband any authority to act for the wife in executing deeds to her separate property, such a power being inconsistent with and in contravention of our statute requiring the signature and privy acknowledgement of the wife joined by her husband to convey such property.

2nd. The deed to Whitfield Scott executed by George L.
15 Hammekin, for himself and as attorney-in-fact for his wife, was without authority of law, was not privily acknowledged by the wife as is required in cases of the conveyance of the separate property of the wife, and conveyed none of her title.

3rd. The deed from Whitfield Scott to defendant, T. J. Oliver, being based upon the foregoing instruments, should fail with them, and was not evidence of any title.

Which objections the court overruled and admitted in evidence the said instruments; to which ruling of the court the plaintiffs excepted and in open court tenders this bill of exceptions and pray that the same may be signed and approved by the court and made a part of the record of this cause.

A. P. M'CORMICK,
U. S. Dist. Judge.

(Endorsed:) No. 343. Sarah R. Mexia *et al. vs.* T. J. Oliver. Plaintiffs' bill of exceptions No. 1. I think this bill substantially correct. A. C. Prendergast. Filed Ap'l 24, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

16 *Plaintiffs' Motion for New Trial.*

SARAH R. MEXIA *et al.*
vs.
T. J. OLIVER. } No. 343.

Suit in circuit court of United States for northern district of Texas, at Waco.

In this cause come the plaintiffs and move the court to set aside the verdict herein rendered on 22nd of April, 1889, and to grant plaintiffs a new trial for the following reasons, to wit:

1st. Said verdict is contrary to the law in this case as given in charge to the jury by the court and is contrary to the evidence in the case, all of the legitimate positive testimony in the case showing clearly and beyond a doubt that the lower line of the Cabellero 6,000-acre tract of land was actually run upon the ground and marked off by the surveyor, G. H. Cunningham, in 1855, and that said line was subsequently acquiesced in by said Cabellero and the Hammekins, the adjacent owners of the lands on both sides of said line, as the true division line between said tracts.

2. Because the court erred in admitting in evidence over plaintiffs' objections the power of attorney made by Adelaide M. Hammekin to her husband, Geo. L. Hammekin, authorizing him to act for her in the sale and disposition of her real property, and in admitting in evidence over plaintiffs' objection the deed from said Adelaide M. Hammekin, acting by her said husband as attorney-in-fact, to Whitfield Scott, conveying the land here in controversy, said power of attorney being in controvention of the policy of our laws as decided by our courts, and said deed, under our said decision, being insufficient to bind a married woman or to convey her separate property, having never been privily acknowledged by her.

17 3. The court erred in permitting the defendant Oliver and the witness Roberts to testify as to lengths of the various section lines of Pedro Varela eleven-league section, said proof being wholly immaterial to the ascertainment of whether a line had actually been run and acquies-ed in by the adjacent owners, as claimed by plaintiffs, but, on the contrary, said proof tending to confuse the minds of the jurors and cause them to consider whether plaintiffs had their quantity of land in the various sections, instead of the true location of the division lines between the Cobellero tract and the balance of the eleven leagues.

THOS. HARRISON,
JOHN HANCOCK,
ANDREWS & LESSING,
Att'ys for Pl'ff.

(Endorsed:) No. 343. Sarah R. Mexia *et al. vs.* T. J. Oliver. Plaintiffs' motion for a new trial. Filed April 23, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Texas, at Waco, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Sarah R. Mexia, joined by her husband, E. A. Mexia, plaintiffs, and T. J. Oliver, defendant, the number of said cause on the docket of said court being 343, a manifest error hath happened, to the great damage of the said plaintiffs, Sarah R. Mexia and E. A. Mexia, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 2d day of Sept., in the year of our Lord one thousand eight hundred and eighty-nine.

J. H. FINKS,
Clerk of the Circuit Court of the United States, Northern District of Texas.

Allowed by—
A. P. McCORMICK,
U. S. Dist. Judge.

19 [Endorsed:] No. 343. U. S. circuit court, northern district of Texas, at Waco. Writ of error. Issued Sept. 2d, 1889. J. H. Finks, clerk.

20 The United States of America to T. J. Oliver, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed

in the clerk's office of the circuit court of the United States for the northern district of Texas, at Waco, Texas, wherein Sarah R. Mexia and her husband, E. A. Mexia, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Andrew P. McCormick, judge of the district court of the United States for the northern district of Texas and *ex officio* judge of said circuit court, this fifth day of Sept., in the year of our Lord one thousand eight hundred and eighty-nine.

A. P. McCORMICK,
U. S. Dist. Judge.

21 On this 10th day of September, in the year of our Lord one thousand eight hundred and eighty-nine, personally appeared Geo. A. Knight, U. S. marshal, N. D. T., before me, the subscriber, and makes oath that he delivered a true copy of the within citation to T. J. Oliver, a resident of the city of Dallas, at 11 o'clock a. m. to-day, at Dallas, Tex.

GEO. A. KNIGHT.

Sworn to and subscribed this 10th day of September, A. D. 1889.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS,
Clerk U. S. Cir. C't, N. D. T.,
By C. A. RICHARDSON, *Deputy.*

Fee	$2 00
Cab	50
	$2 50

[Endorsed:] Returned and filed Sept. 11th, 1889. J. H. Finks, clerk.

22 *Appeal Bond.*

Know all men by these presents that we, Sarah R. Mexia, E. A. Mexia, are held and firmly bound unto T. J. Oliver in the full and just sum of five hundred dollars, to be paid to said T. J. Oliver, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a regular term of the United States circuit court for the northern district of Texas, sitting at Waco, Texas, in April, 1889, in a suit pending in said court between Sarah R. Mexia,

joined by her husband, E. A. Mexia, plaintiffs, and T. J. Oliver, defendant, number of said cause on said court docket being 343—

A judgment was rendered against the said plaintiffs, Sarah R. Mexia and E. A. Mexia, and in favor of said defendant, T. J. Oliver, and the said Sarah R. Mexia and E. A. Mexia, plaintiffs, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said T. J. Oliver at Dallas, Texas, dated at Waco, Texas, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiffs, Sarah R. Mexia and E. A. Mexia, shall prosecute their said writ to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be
23 void; else to remain in full force and virtue.

SARAH R. MEXIA. [SEAL.]
E. A. MEXIA. [SEAL.]
W. H. RICHARDSON.
W. R. ROBERTSON.

Sealed and delivered in the presence of—

ADELE A. MEXIA.
JOS. A. JERGER.

Approved by—

A. P. M'CORMICK,
U. S. Dist. Judge.

THE STATE OF TEXAS, }
County of Limestone. }

I, W. P. Brown, clerk county court, Limestone county, Texas, do hereby certify that W. H. Richardson and W. R. Robertson, sureties to the within bond, are reliable gentlemen and worth more than five hundred dollars over and above the exemption laws of this State, and if said bond was in my court I would approve same without hesitation.

[SEAL.] Given under my hand and seal of office, at Groesbeck, Texas, this 30th day of August, 1889.

W. P. BROWN,
Clerk County Court, Limestone County, Texas.

(Endorsed:) No. 343. U. S. circuit court, northern district of Texas, at Waco. Sarah R. Mexia *et al. vs.* T. J. Oliver. Bond. Filed Sept. 9, 1889. J. H. Finks, clerk.

24 *Assignment of Error.*

SARAH R. MEXIA *et als.*
vs.
T. J. OLIVER. } No. 343.

Suit in the circuit court U. S., northern district of Texas, at Waco, Texas, April term, 1889.

The plaintiffs assigns as errors committed on the *the* trial of the above-named cause on April 22nd, 1889, in said court the following actions of the court, to wit: 1st assignment of errors, the court erred in allowing defendant, over plaintiffs' objection there and then made, as shown by plaintiffs' bill of exceptions No. 1, to introduc*ing* in evidence, 1st, the power of attorney made by Mrs. Adelaide M. Hammekin to her husband, Geo. L. Hammekin, authorizing and empowering him to sell her separate property; 2, a deed to Whitfield Scott, made by said Geo. L. Hammekin, acting for himself and as agent for his wife under said power of attorney, conveying 6,000 acres of land here in controversy to said Scott, said deed dated March 18th, 1875; 3, a deed from said Scott to defendant Oliver of date March 20th, 1875, conveying said 6,000 acres; because—1, said power of attorney from Adelaide M. Hammekin to her husband, Geo. L. Hammekin, could not authorize him to act for her and as her agent in conveying her separate property, said instrument being void under the statute & decisions of Texas requiring the privy acknowledgment of married women to transfers of their separate real property; 2, the deed from Geo. L. Hammekin, acting for himself and wife, to W. Scott, not being signed by her and acknowledged by her privily and apart from her said husband, did not, under said statute & decisions, convey her separate property, and, 3, said deed from Scott to defendant, being based on the foregoing invalid instruments, must fall with them.

ANDREWS & LESSING,
25 *Att'ys for Pl't'fs.*

(Endorsed:) No. 343. Sarah R. Mexia *et al. vs.* T. J. Oliver. Assignment of errors. Filed Sept. 16, 1889. J. H. Finks, clerk, by Chas. A. Boynton, deputy.

26 UNITED STATES OF AMERICA, } *ss:*
Northern District of Texas, }

I, John H. Finks, clerk of the circuit court of the United States of America for the northern district of Texas, at Waco, in the fifth circuit, do hereby certify that the foregoing pages, numbered from one to twenty-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Sarah R. Mexia *et al.*, plaintiffs in error, against T. J. Oliver, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Waco, in the northern district of Texas, in the fifth circuit, this the — day of September, A. D. 1889, and of the Independence of the United States the 114th year.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.

J. H. FINKS,
Clerk of the United States Circuit Court for the Northern District of Texas, at Waco.

Endorsed on cover: Case No. 13,772. N. Texas C. C. U. S. No. 182. Sarah R. Mexia and E. A. Mexia, her husband, plaintiffs in error, *vs.* T. J. Oliver. Filed October 15, 1889.

148 U.S. 664

Office Supreme Court U. S.
FILED.
OCT 15 1889
JAMES. H. McKENNEY.
CLERK.

In Supreme Court U. S.

AT WASHINGTON, D. C.

OCTOBER TERM, 1889.

SARAH R. MEXIA ET ALS., PLAINTIFFS IN ERROR,

vs.

T. J. OLIVER, DEFENDANT IN ERROR.

Tried in Circuit Court of United States for Northern District of Texas, at Waco.

BRIEF OF PLAINTIFFS IN ERROR.

A. H. Evans
~~ANDREWS & LESSING,~~
Counsel for Plaintiffs in Error.

J. M. DRAKE, PRINTER, WACO.

In Supreme Court U. S.

AT WASHINGTON, D. C.

OCTOBER TERM, 1889.

SARAH R. MEXIA ET ALS., PLAINTIFFS IN ERROR,

vs.

T. J. OLIVER, DEFENDANT IN ERROR.

Tried in Circuit Court of United States for Northern District of Texas, at Waco.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

The land in controversy is a portion of the eleven leagues granted to Miss Adelaide Mexia (afterwards Mrs. A. M. Hammekin) assignee of Pedro Varela, and said grant is known as the Pedro Varela eleven league grant in Limestone county, Texas. In 1850 the said Mrs. Hammekin, joined by her husband Geo. L. Hammekin, sold to Jose M. Caballero six thousand acres out of the northeast corner of said grant, and the location of the south boundary line of said six thousand acre tract is the issue in this action.

The deed from the Hammekins conveying to Caballero the said tract, calls for the eastern boundary line of said

six thousand acres to extend with the east boundary line of the eleven leagues from the northeast corner of the same, south 45 degrees east 2530 varas, and defendant in error (being defendant below) claims in accordance with said call in said deed. (Defendant's answer, R. p. 6).

Plaintiffs claim and allege that at the time of the sale of said land to Caballero the same had not been surveyed, and that there was in fact no survey thereof until in June, 1855, when said six thousand acre tract was actually surveyed and marked on the ground by the said Hammekins and said Caballero at a distance of 2253 varas south 45 degrees east from the northeast corner of said eleven league. That this line was by the said Hammekins and Caballero recognized as the true south boundary line of said Caballero tract and its location at that point acquiesced in by them the then adjacent owners of said lands. (Plaintiff's petition, R. 1, 3, 4.)

Plaintiff alleges that the land south of and adjacent to said last named line was sectionized for said Hammekins in 1856, by G. H. Cunningham, the same surveyor who established said line for said parties and Caballero in 1855. That in sectionizing he began section No. 1 at the southeast corner of said Caballero tract, at a point in the eastern boundary line of the eleven league grant 2253 varas from the northeast corner of the same. (R. 1-2). That all said sections lying south of said six thousand acre tract up to and including part of section six were set apart to plaintiff by deed of partition between plaintiffs and said George L. Hammekin and wife by deed of partition of date March 30, 1874. R. 1-2.

Defendant claims the Caballero tract according to the calls in the original deed from Hammekin to Caballero in 1850, and claims to have acquired title through two different claims to-wit: First, from Mrs. Maria Dolores Felicite Conte, heiress of Caballero, on July 27, 1874, and secondly, by deed from the said Hammekins to Scott and from Scott to defendant T. J. Oliver. R. 8-9. (Said last named deeds were of date respectively March 18 and 20, 1875. See plaintiff's bill of exceptions for dates. R. 14.

15). On the trial of the cause in the Circuit Court plaintiff objected to defendant's evidence introduced under his said second chain of title for the reasons set out in plaintiff's bill of exceptions No. 1, which objections were by the court overruled, and plaintiff excepted. (See bill of exceptions, pp. 14-15).

Defendants had judgment for costs (R. 12).

Assignment of Errors.

The court erred in allowing defendant, over plaintiff's objection there and then made, as shown by plaintiff's bill of exceptions No. 1, to introduce in evidence—first, the power of attorney made by Mrs. Adelaide M. Hammekin to her husband George L. Hammekin, authorizing and empowering him to sell her separate property; second, a deed to Whitfield Scott, made by said George L. Hammekin, acting for himself and as agent for his said wife under said power of attorney conveying the 6000 acres of land here in controversy to said Scott, said deed dated March 18th, 1875; third, a deed from said Scott to defendant Oliver of date March 20, 1875, conveying said 6000 acres; because, first, said power of attorney from Adelaide M. Hammekin to her husband George L. Hammekin could not authorize him to act for her and as her agent in conveying her separate property, said instrument being void under the stat ute and decisions of Texas requiring the privy acknowledgment of married women to transfers of their separate real property; second, the deed from George L. Hammekin acting for himself and wife to W. Scott not being signed and acknowledged by her privily and apart from her said husband did not under said statute and decisions convey her separate property; and third, said deed from Scott to defendant being based on the foregoing invalid instruments must fall with them. R. 24.

The plaintiffs in error rely upon the foregoing assignment of errors for reversal herein.

Article 559 of the Revised Statutes of Texas reads as follows: "The husband and wife shall join in the conveyance of real estate, the separate property of the wife; and

no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized," etc., "to take acknowledgements to deeds."

The above statute has been interpreted by the Supreme Court of Texas in the case of Connor vs. Boutwell, 53 Tex. Rep. 626. That was a case wherein the title of the defendant depended (as in the case at bar) upon the validity of a power of attorney executed and privily acknowledged by the wife authorizing her husband to sell her separate real property, and upon the validity of a deed made by said husband under said power, acting for himself and wife, said deed executed by him without her privy acknowledgement.

The lower court held these instruments insufficient to pass the wife's title. The Supreme Court affirmed said judgment and in rendering the opinion used this language:

"A deed or *power of attorney* signed by the wife alone is not such an instrument as the statute makes effective to pass her estate. The decisions under similar statutes have been uniform in holding the separate conveyance of the wife invalid notwithstanding it may have been clearly shown that she acted with her husband's assent," and cites in support of the proposition the following decisions:

Trimmer vs. Heagy, 16 Pa. St. 484.

Sexton vs. Pickering, 3 Rand. 468.

Baxter vs. Bodkin, 25 Ind. 172.

Fowler vs. Shearer, 7 Mass. 14.

Whittaker vs. Blair, 3 J. J. Marshall, 236.

1 Bishop on Law of Married Woman 593, and authorities cited.

The court further says: "The statute does not attempt to provide for either conveyances or powers of attorney from the wife to the husband, and we think it would be a departure from the policy of the law wholly unauthorized by anything in the statute, to allow the husband by means simply of a general power of attorney from the wife to dispose of her separate estate at his will."

The power of attorney to the introduction of which in

evidence plaintiffs in error reserved their bill of exceptions (R. 14) was executed by Mrs. A. M. Hammekin to her husband George L. Hammekin, authorizing him to sell her separate real property and was under the authority above quoted ineffective to pass to him any right to transfer said property without her privy acknowledgement, while the deed from Geo. L. Hammekin to W. Scott, also objected to, was in the language of said decision "wholly unauthorized by anything in the statute."

The case of Connor vs. Boutwell aforesaid was followed by our Supreme Court of Texas in Peak vs. Brinson, 71 Tex. Rep. 310. There the validity of a power of attorney and deed made under the same, executed just as in the case at bar, were held to be *void* as a conveeance of the wife's separate property.

The statute of Texas has, in respect to the validity of such instruments, remained unchanged in effect for a great number of years (since 1846). In Cannon vs. Boutwell, *supra* decision rendered in 1880, the statute was applied to Instruments made in 1856 and 1858, while in Peak vs. Brinson, decided in 1888, the application of the statute was to instruments made as in the case at bar, between the years 1870 and 1880.

Applying the above decisions to the case at bar, we conclude and respectfully submit, that the court erred in admitting in evidence the instruments to which the assignment of errors aforesaid refers.

Believing that counsel for defendant in error will not attempt to deny that the action of the court in the admission of said testimony was erroneous, but will seek to show that such error was immaterial, we desire by way of anticipation to present our conclusions as to the materiality of the same, and why the judgment of the circuit should be reversed.

The deed from Whitfield Scott to defendant Oliver constituted a link in one of the chains of title affirmatively pleaded by said defendant (R. 9) and said deed was based upon the deed from Geo. L. Hammekin, for himself and wife, to said W. Scott, while this latter deed was made

under the authority of the invalid power of attorney from Mrs. Hammekin to her husband. These three instruments constitute one chain of defendant's title, and it was to the admission of them in evidence that plaintiff reserved his bill of exceptions. R. 14-15.

The defendant in error, by affirmatively pleading this chain of title, tendered an issue thereon, which issue was joined by plaintiffs in their supplemental petition. R. 10.

This issue was as important as any in the case. It *may* have been the pivotal point. Let us suppose that plaintiffs on the trial had proven their case and were *prima facie* entitled to a verdict. Then suppose that defendant had proven his said chain of title according to his allegations concerning the same. Would defendant have been benefitted by his said proof? He evidently thought so, else he would not have encumbered his pleadings with that issue. And we are not prepared to say he was wrong in his conclusions.

If, then, defendant *might* have been benefitted by such proof—the jury probably acting on it—the admission of the testimony objected to was, at least, *probably* injurious to plaintiffs, and consequently *probably* material.

This being the case, and the record failing to contain all the testimony introduced on the trial of the cause, we conclude that it does not *affirmatively* appear from the record that no injury was done to plaintiffs by the admission of the improper testimony; and that consequently, following the rulings of this Honorable Court, on this point, in Derry vs. Cray, 5 Wall. 807, and Gilmer vs. Higley, 110 U. S. Rep. 47, this cause should be remanded for a new trial.

We understand the rule announced in those decisions to be that this court will not *presume* that an error was not injurious to the complaining party, but that the record must affirmatively show (which in this case it fails to do) that the error was not, and could not have been, injurious to him.

In Derry vs. Cray, *supra* we find this language used in passing upon the point at bar: "Whenever the application of this rule is sought, it must appear so clear as to be beyond doubt, that the error did not, and could not, have

prejudiced the party's rights," and this language was quoted with approval by this Honorable Court in Gilmer vs. Higley *supra* when the point raised by the defendants in error was that the record failing to contain all of the evidence the court could not see that injury had been done, and consequently should not reverse the cause. (110 U. S. p. 50).

The Circuit Court, in permitting the introduction of the evidence complained of in the case at bar, said, in effect, that it was a valid title and entitled to the consideration of the jury to the same extent as any other competent testimony. Here, this spurious title had thrust upon it an unwarranted degree of respectability, and was particularly called to the attention of the trial jury, by reason of the objections urged to it in the presence of said jury, and by reason of its being there sustained by the court. Under this state of facts who but the jury can say what effect said testimony had on their minds in arriving at a verdict. It certainly does not "appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights with the jury and influenced them in finding a verdict.

Plaintiff alleged that the southern boundary of the 6000 acre tract was established at 2253 varas from the northeast corner of the eleven league grant, and that Mrs. Hammekin, as well as her husband and Caballero, agreed to and acquiesced in said line. R. 3-4. The testimony objected to tends strongly to disprove the *acquiescence* of Mrs. Hammekin, while it does not appear that she knew anything about the pretended sale. That testimony, to controvert an important fact in plaintiff's case, should at least have been *admissible* under our decisioes.

Acquiescence and agreement on the part of Mrs. Hammekin was an issue in the case, without the establishing of which plaintiff could not recover; and the objectionable testimony controverted this issue and was calculated to disprove it, wherefore we ask that the cause be reversed.

~~ANDREWS & LESSING,~~ A. H. Evans
Counsel for Plaintiffs in Error.

148 U.S. 664

Office Supreme Court U. S.
FILED.
MAR 27 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

SARAH E. MEXIA *et al*,
Plaintiffs in Error.

against

T. J. OLIVER, *Defendant in Error.*

No. 182.

WRIT OF ERROR TO THE NORTHERN DISTRICT OF TEXAS, AT WACO.

Assignment of Errors.

1. It was error for the Court to admit in evidence and against plaintiff's objection, the Power of Attorney of A. M. Hammekin to her husband, which authorized him to sell and convey the land in controversy, which was claimed as her separate property.

2. It was error to admit in evidence the deed made by Geo. M. Hammekin, the husband, to Whitfield Scott, acting for himself and for his wife, dated March 18, 1873.

3. In admitting the deed of said Scott to Oliver, the defendant in error, of March 20, 1875, the Court also erred.

These conveyances and power of attorney were offered for the purpose of making out defendant's chain of title; whereas, A. M. Hammekin could not, by power of attorney,

authorize her husband to sell and convey her separate property. It was void as a trasfer or title, being without authority of law, unsigned by her and wanting a privy acknowledgment by Mrs. Hammekin; and the deed to Scott, not being valid, conveyed no title from Mrs. Hammekin to said Scott; and as Scott had no title, he could convey none to Oliver.

The contention here is this: Pedro Varela owned a claim for eleven leagues of land in Limestone County, Texas; this he assigned to Adeline M. Mexia, to whom the grant issued. She afterwards intermarried with A. M. Hammekin. Hammekin and wife sold six thousand acres of this land in 1850 to Jose M. Caballero, which was to come out of the northeast corner of said eleven leagues, but the land was not surveyed until June, 1855, when it was actually marked on the ground and surveyed by the Hammekins and said Caballero, the south boundary being at a distance of 2,253 varas south, 45° east, from the northeast corner of said eleven league tract. This line was, by the said Hammekins and Caballero, recognized as the true south boundary line of the said Caballero tract, and its location at that point acquiesced in by them the then adjacent owners of said land. (See Record, pp. 1 and 2.) The plaintiffs claim that the land south of this last named line was sectionized for the Hammekins in 1856 by Cunningham, the same surveyor who ran the line for said parties and Caballero in 1855; that in making his sections he began at Number 1, which was the southeast corner of the Caballero tract, and at a point on the eastern boundary line of the eleven league grant, 2,253 varas from the northeast corner of the same; and that all the sections lying south of the six thousand acre line, being sections one, two, three, four, five and part of six, were set apart to plaintiffs by a Deed of Partiton between them and the said Hammekin and wife by a deed of date March 30, 1874.

The defendant in error claims the Caballero tract, according to the original calls in the deed from the Hammekins to Caballero in 1850, and for 2,530 varas, and he claims from Maria Dolores Felicite Conte, heiress of Caballero, by deed of July 27, 1874, in the first place; and secondly by a deed from the Hammekins to Scott; and then from Scott to the defendant, Oliver. The last deeds bear date of March 18 and 20, 1875. (Record, pp. 2, 3, 4 and 5.) So the land in controversy is in width or extent 277 varas, beginning at the northeast corner of the eleventh league grant, we run down south 2,253 varas, 45° east. That is all the land which plaintiffs in error say belongs to the Caballero tract, and from that point downward, and to the extent of four thousand acres, is the land which we insist belongs to the plaintiffs in error.

There are no deeds in the record and no evidence as to what other facts were developed in the court below touching the questions at issue between the parties. This court cannot see for itself anything beyond what is disclosed in this meagre record, but we insist that the court below committed palpable error, and therefore the case should be reversed.

The Revised Statutes of Texas, Article 559, read as follows:

"The husband and wife shall join in the conveyance of real estate, the separate property of the wife, and no such conveyance shall take effect until the same shall have been acknowledged by her privily and apart from her husband before some officer authorized," etc., "to take acknowledgments to deeds."

This question has been repeatedly passed upon by the Supreme Court of Texas. A married woman may join with her husband in a power of attorney to another under the law of Texas, and acknowledge the same as provided by law, in which case the holder of the power of attorney can

convey. (Patton *vs.* King, 26 Texas, 685.) But the husband who acts under a general power of attorney from the wife cannot convey her separate estate. (53 Texas, 623, Cannon *vs.* Boutwell.) In that case the title rested upon the validity or invalidity of a power of attorney executed and privily acknowledged by the wife, which authorized her husband to sell her separate estate, and upon the validity of the deed made by said husband under said power. The power of attorney and deed were held to be of no validity, the court saying that such papers, signed by the wife alone, are not effective to pass her estate. The separate conveyance of a wife, under statutes in different States, although acting with her husband's assent, are shown to be of no vital import. Cases cited: 1st Bishop on Law of Married Women, section 593; Whitaker *vs.* Blair, 3d J. J. Marshall, 236; Fowler *vs.* Sheaver, 7 Mass., 14; Baxter *vs.* Bodkin, 25 Ind., 172; Sextion *vs.* Pickering, 3d Rand., 468; and a case in 16 Pa. St., 484; Trimmer *vs.* Heagy.

The decision in Connor *vs.* Boutwell was readopted by the Supreme Court of Texas in Pink *vs.* Brinson, 71 Texas, 310. The case there was like the one at bar, and it was held that the power of attorney and deed were void.

This ruling has been uniform in the courts of that State on this question from 1846 to 1880, and subsequently. There has been no reversal of the law upon this point. Indeed, the court, in speaking of the statute relating to conveyances (Connor *vs.* Boutwell, 53 Texas, 626), construes it by saying:

"The statute does not attempt to provide for either conveyances or power of attorney from the wife to the husband," * * * and does not "allow the husband, by means simply of a general power of attorney from the wife, to dispose of her separate estate at his will."

It may be insisted that the error or errors claimed to be

such are immaterial, and consequently furnish no ground for a reversal of the court below. As already stated, the court is unable to see what was the testimony below, and the full contention there made by the parties. But it is not for us affirmatively to show that the errors complained of were material (though we insist they were) to the proper determination of the case. The rule on this subject has been laid down by this court in 5th Wallace, 807; Derry *vs.* Cray, 807. The Supreme Court say:

"Although no judgment should be reversed when the error complained of works no injury, yet, in order to apply such rule, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the parties' rights;"

a doctrine more fully stated in Gilmer *vs.* Higley, 110 U. S., page 47:

"The rule that, when a court can see affirmatively that the error complained of worked no injury to the party appealing it will be disregarded, is not applicable unless it appears so clear as to be beyond doubt that the error did not and could not have prejudiced his rights."

So it will be seen that if the defendant in error shall be unable to show from this record that the plaintiffs in error were not and could not have been prejudiced by the errors assigned—and that, beyond all doubt—this court will reverse.

WM. S. FLIPPIN,
Attorney for Plaintiffs in Error.

148 US 669
144

Office Supreme Court U. S.
FILED.
APR 1 1893
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1892.

SARAH R. MEXIA, ET AL.,
Plaintiffs in Error,
AGAINST
T. J. OLIVER, Defendant in Error.
} No. 182.

WRIT OF ERROR TO THE NORTHERN DISTRICT OF TEXAS, AT WACO.

S. L. SAMUELS and
BAKER & PRENDERGAST,
By A. C. PRENDERGAST,
Attorneys for Defendant in Error.

KELLNER PRINTING CO., WACO.

IN THE

SUPREME COURT

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OCTOBER TERM, 1892.

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Plaintiffs in Error,
AGAINST
T. J. OLIVER, Defendant in Error.
No. 182.

WRIT OF ERROR TO THE NORTHERN DISTRICT OF TEXAS, AT WACO.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

1st. We submit that the record in this case, as meager and imperfect as it is, shows that there was no question of *title* in the case, and that the sole question was, *one of boundary.*

The plaintiffs petition sets up, that Sarah R. Mexia

was the owner of a certain tract of land, part of the Pedro Varela 11 League Grant describing it particularly, (pages 1 and 2 printed record). Then proceeds with this allegation, which is the gist of the suit :

"Plaintiffs would show to your honor that on the 11th day of February, 1850, Adeliade M. Hammekin, joined by her husband Geo. L. Hammekin, being at that time the owners of said eleven-league grant, made, executed and delivered to one Jose M. Cabellero a conveyance for 6,000 acres of said eleven-league grant, out of the northeast corner of same, before any actual survey was made of said 6,000 acre tract, and that the same was never actually surveyed on the ground until the month of June, 1855, at which time said 6,000 acre tract was actually surveyed on the ground and cut off from said eleven-league grant, and the south or southwest boundary thereof was well established on the ground in accordance with the field notes as hereinbefore set forth, and the same has ever since been held and regarded and acquiesced in as the south boundary of said 6,000 acre tract and as the division line between the same and the remainder of said eleven-league grant on the south and west thereof, and from that time to the present, said line and survey has been acquiesced in by the adjacent owners of the land north and south of said line.

"That said survey was made and said lines established by G. H Cunningham, then surveyor of the land district in which said land was situated, and was done by request and authority of said J. M. Cabellero and the said Hammekins, and said survey and lines were after ratified by said Cabellero and the said Hammekins, and ever since acquiesced in by them and their vendees Now plaintiff would show that such title as defendant claims under is derived from said Cabellero under said convey-

ance for 6,000 acres, and that defendant will claim and insist in this cause that the south boundary line of said 6,000 acre tract in name of said Cabellero should be at a point about 277 varas further south than as heretofore established and as claimed by plaintiff herein." (Pages 2 and 3 printed record). The petition then concludes with a formal declaration of ouster by defendant and prayer for relief. (Page 3).

Defendant answers general demurrer, and denials, and then sets out by metes and bounds the land he claims, viz: "And further answering, defendant says he has been in quiet, peaceable, continuous, and adverse possession for more than three years before the filing of plaintiffs suit herein of so much of the lands described in said petition as may be and is included in the boundaries following, to-wit: In Limestone County, about six miles above the town of Sringfield, on the Northern or left of the river Navasota, being a part of the eleven-league grant by the State of Coahula and Texas to Pedro Varilla and commencing on the left bank of the Eastern (or Northern) branch of the Navasota at the point where the original line of said eleven-league grant from the second to the third corners crosses the said creek; thence N. 45 E. following the orignal line of said eleven-league grant, to the original third corner; thence S. 45 E. two thousand five hundred and thirty (2,530) varas, following the original line of said eleven-league grant; thence S. 45 W. being a line parallel with first line of this survey, to the left bank of the Navasota thence up said river to the beginning." (Pages 3 and 4). And *then disclaims all the lands sued for by plaintiff except the above claimed by him*, as follows:

"And this defendant, as to all not included in said boundaries disclaims and says he did not set up any

claim thereto at or before the institution of this suit, nor does he at this time, nor has he committed any trespasses thereon." (Page 4.)

Then pleads limitation and improvements in good faith, and sets up his purchase of the said tract claimed by him from Mrs. Conti, the only heir of J. M. Cabellero, and later from Scott. (Page 5).

Messrs. Andrews & Lessing one of attorneys for plaintiffs in error, and the attorneys for them, who tried the case in the Court below, in their brief herein on page 1, state expressly; "the location of the south boundary line of said 6,000 acre tract *is the issue in this action.*" And their statement of the case on pages 1 and 2 of their brief, is a substantially correct statement of this suit.

Second: The question at issue then, being, whether the south line of said 6,000 acre tract was changed from that called for in the original deed from the Hammekins to Cabellero "by request and authority of said J. M. Cabellero, and the said Hammekins, and said survey and line were afterward ratified by said Calbellero and the said Hammekins," we contend and submit that said power of attorney from Mrs. to Mr. Hammekin, and the deed by him for himself and his wife, and their other vendee, Scott, were admissable in evidence as a circumstance to show that they and Cabellero had not changed the line as originally deeded by the Hammekins to Cabellero. These deeds describe and "conveyed the 6,000 acre Cabellero tract of land, by metes and bounds, as claimed by defendant" (Page 8, Bill of Exceptions.) and were made March 18th, 1875.

These instruments, for this purpose, were admissable in evidence just like any other writing—letter or verbal statement, by the Hammekins, or either of them, would be, which tended to prove they had made no such

change in the boundary of the land they conveyed to Cabellero in 1850, as claimed by plaintiffs.

These instruments were not offered to prove *title*, nor were they admitted for any such purpose by the Court below, and hence the authorities cited by the attorneys for plaintiffs in error to the effect that said instruments do not convey *the title* are inapplicable.

The labored argument of the attorneys for the plaintiffs in error, to the effect that from the record some other question *may* have been in issue in the case, so as to make the admission of said instruments error, it seems to us is all in vain, when the record and their own brief shows that nothing but a question of boundary was involved, and we respectfully submit that the case should be affirmed.

S. L. SAMUELS and
BAKER & PRENDERGAST,
By A. C. PRENDERGAST,
Attorneys for Defendant in Error.

148 US 664

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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States.

SARAH R. MEXIA *et al.*,
PLFFS. IN ERROR,

v.

T. J. OLIVER,
DEFT. IN ERROR.

No. 182.

REPLY.

The question of title was distinctly raised in the pleading (Rec., pp. 1, 2, and 3) and notice given (p. 3).

The Caballero 6,000 acres was conveyed twice; once by the Hammekins, but whether in the regular way or by power of attorney the record does not disclose. After the deed of partition fixing the S. boundary at 2,253 varas 45° E., &c., in 1855, it was conveyed the second time under the defective mode stated in our brief to Whitfield Scott, who conveyed to the defendant in error. Nothing to show why Hammekins conveyed twice.

Reference is made to the brief of Andrews and Lessing. They do not (this counsel feels compelled to state) represent the plaintiffs in error.

His letters show he was retained in 1890, and has the sole management of this cause for them. Not the slightest reflection is intended to be made on the gentlemen named. Perhaps they sued out the writ of error, and expected to appear here, but, not being members of this bar, asked another gentleman to enter an appearance to prevent a dismissal upon motion. Besides filing that brief, no one has had anything to do with the case, except this counsel. Andrews & Lessing were doubtless fully advised. Plaintiffs in error are not to be bound in any way, therefore, by anything in said brief contained, and which ought not to be on the files.

WM. S. FLIPPIN,
For Plaintiffs in Error.